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IN THE

Supreme Court of The United States

October Term, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner-Appellee Below

versus

LYKES BROS. STEAMSHIP CO., INC.
Respondent-Appellant Below

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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MAY IT PLEASE THE COURT:

Most of the arguments contained in respondent's brief have been traversed in petitioner's original brief. Several of respondent's allegations, however, require comment:

REGARDING THE FACTS

(1)

At page 23 of its brief respondent states that an assertion contained in petitioner's brief under his "Statement of Facts," namely, "Leaving Boudoin's living quarters Gon-

zales armed himself with a butcher knife," is a confection derived entirely from statements attached to the vessel's log book which were excluded from evidence by the District Court.

Respondent's representation is inaccurate.

Petitioner testified specifically at the time of trial in open court, referring to the assailant, that *"he went forward and got a butcher knife after me."*[1] Petitioner's unchallenged testimony proving this fact is supported by the testimony of the shipmaster, Captain Townsend, who testified on cross-examination that during the course of his investigation on the date of the assault for purposes of the official report on ship's business, it was reported to him by Third Mate Brock that the assailant, Gonzales, was met with a large knife in his hand.[2] Although the captain was not present at the knife incident, his investigation of the matter thereafter disclosed, and he so testified, that, "There is no doubt that the knife was taken away from him at that time."[3]

(2)

At page 33 of its brief respondent insists that "the district court predicated a good part of its findings on certain unsworn statements which the district court had itself correctly excluded." Respondent's criticism is unwarranted.

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[1]R. 114.
[2]R. 315.
[3]R. 316.

Firstly, respondent refers to no specific fact (unless respondent had in mind its aforesaid erroneous observation about the knife) which is based solely on the log book appendages.

Secondly, although the findings of the trier of the facts are amply supported by evidence other than the written statements, it is submitted that these written statements are at least corroborative and, therefore, should not be disregarded. Furthermore, the written statements in question are admissible under the Business Entries Statute,[4] as the District Judge may well have found upon reading the captain's desposition which demonstrates that the statements are, in fact, a part of the official log. An examination of the official log book[5] of the *Steamship Mason Lykes* and the testimony of its shipmaster, Captain Townsend,[6] discloses that the said statements are integral parts of the official log book and, by incorporation, comprise an official log entry.[7] A ruling at this time on the point raised by respondent would be helpful, regardless of whether or not the trial court ultimately excluded the statements.[8]

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[4] 28 U.S.C.A. §1732.

[5] R. 291; see also R. 242; pl. ex. "U. S. Coast Guard."

[6] R. pp. 310, 315, 318-319, 323.

[7] *Lopoczyk v. Chester A. Poling, Inc.*, 152 F. 2d 457 (C. C. A. 2d, 1945) holds that a master's official log entry relative to an incident occurring aboard his vessel is admissible in evidence, especially where it is not self-serving or the outgrowth of any prejudice in favor of the party offering it, so as to fall within the prohibition of *Palmer v. Hoffman*, 318, U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

[8] The precise nature of these statements was explained by the captain when he testified that they were a part of his official investigation and log entry. This testimony, in the form of a deposition, was introduced subsequent to the court's exclusion of the statements. The deposition was not read to, but was read by the court, following the date of the trial, and, therefore, it is not unlikely that the district judge may ultimately have decided after reading the depositions that these statements comprised an admissible log entry; *Supra*, Note 6.

(3)

At pages 22 and 23 of its brief respondent argues that the assailant's belligerent reputation is not established because petitioner's testimony does not prove this fact. Respondent quotes the transcript of the record[9] wherein the District Judge interrogated petitioner by asking him what other people *thought* about Gonzales; to this question petitioner replied "Well, what other people *think* about him, that is pretty hard to say, Your Honor." A reference to the full context of this portion of the record will disclose that the questions and answers immediately following those quoted by respondent at least support the permissible inference that the assailant had a general reputation for belligerence.[10]

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[9]Respondent's brief, p. 23, footnote 84.

[10]R. 89, where the record reads:

"A. Well what other people think about him, that is pretty hard to say, Your Honor.

Q. Well, do you know what the other fellows on the ship thought about him?

A. The other fellows talking about him. I think they didn't think very much about him, because he always bullying like that.

Q. Did he ever have any fights on this ship?

A. Yes, sir. He had one with my roommate, Andy Brown, in Durban.

Q. Was it generally known on board the ship that this man had a fight with Brown?

A. Yes, sir.

Q. Did Gonzales tell the crew about any other fights he had?

A. Yes sir. He always telling about how he hit them here in New Orleans before he got on the ship, and how many policemen he beat up and run off there."

The foregoing prior performances on the part of Gonzales are sufficient to support a finding of unseaworthiness even if, as respondent advocates, knowledge of prior misconduct is essential. Therefore, contrary to the assumption of respondent at page 11 of its brief, petitioner does not concede that approval of the *Keen* doctrine is indispensable to respondent's liability.

(4)

At pages 15 to 20 of its brief respondent paints the *Keen* doctrine as undesirable because of its alleged subversive potential toward the American maritime industry. This is an echo of the cry of alarm heard during the evolution of the *Keen* decision.[11]

It cannot be overlooked that during the three years since the appellate decision in *Keen* the American Merchant Marine did not "go fold up."[12]

In its brief the respondent indulges itself in mathematical figures which bear analysis:

(a) At page 19 respondent asserts that in 1939 an able-bodied seaman's average monthly earnings were only $82.00, whereas today they are over $525.00. Respondent makes this observation for the apparent purpose of demonstrating that the seaman's lot has gone from the ridiculous to the sublime. Respondent overlooks the fact that in order to earn $525.00 in any particular month the seaman must work the maximum hours of *overtime* because his base wage is

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[11] *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515, 518 (C. C. A. 2d, 1952); "The American Merchant Marine could go fold up if we ever imposed an obligation of that sort on them." The fallacy of this prediction was emphasized and explained by Judge Learned Hand in his *Keen* opinion.

[12] It is interesting to note in four cases which our research discloses to have been predicated on the theory expressed in *Keen*, that in two of the cases recovery was denied to the plaintiffs, *Jones v. Lykes Bros. Steamship Co., Inc.*, 204 F. 2d 815, and *Stankiewicz v. United Fruit Steamship Corp., et al.*, 123 F. Supp. 714, and that in the remaining two cases the seamen recovered an aggregate of less than twenty thousand dollars, *Kelcey v. Tankers Co., Inc.* 217, F. 2d, and *Thompson v. Coastal Oil Co.*, 119 F. Supp. 838.

actually $314.41 per month.[13] Also, it is obvious that in order for a seaman to average these monthly earnings on an annual basis he must be continuously employed throughout the year. It is the exception rather than the rule for a seaman to work during all of any given year, because of such factors as rotary shipping, the lay-up and repair of vessels, and the very nature of the calling; moreover, as conditions have improved many seamen have been able to acquire families and homes from which they are naturally reluctant to be continuously separated. From the foregoing it may be concluded that (1) the betterment of the seaman's lot is not as phenomenal as respondent would imply; and that (2) such betterment and improvement, as have been accomplished, redound to the advantage of the shipowner and the nation by making the seafarer's calling more attractive to those creditable men who would follow the sea.

(b) At page 16 respondent states that in *Jones v. Lykes Bros. Steamship Co., Inc.* the seaman, Jones, who was denied recovery for damages, actually recovered in maintenance over $11,500.00. We are informed that this seaman, Jones, did not *recover* the sum stated, but was paid that amount in *compromise* of his claims, not only for maintenance, but also for *damages* resulting from the shipowner's failure to meet its maintenance obligation.

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[13] *Industrial Relations in the Ocean Shipping Industry*, Report of Industrial Relations Counselors, Inc., to Maritime Industry Survey Committee, (1953).

REGARDING THE LAW

(1)

At page 13 of its brief respondent criticizes petitioner's analysis of the *rationale* of the *Jones* and *Keen* cases, stating that "petitioner's brief in this court somehow gets the two cases hopelessly mixed up and exactly reversed." Respondent's statement may better serve as a confession rather than an accusation. Respondent's confusion stems from its erroneous reading of the *Jones* case, from which respondent specifically states at page 13 that "*in Jones, the injured party did not provoke the assault and did not recover.*" Respondent attempts to support this erroneous statement by a quotation from the *Jones* case, contained in footnote 44 at page 13 of its brief. The quoted finding is that of the District Judge in the *trial court*,[14] which *allowed* recovery on the basis of an *un*provoked assault. The *appellate* court did not find, as the District Judge did, that the assault on Jones was *un*provoked. The *appellate* court, therefore, *denied* recovery.

In summary, it was the *trial* court which made the finding quoted by respondent that there was no provocation for the assault and awarded the plaintiff damages. This, of course, was consistent with our original position that provocation may be one of the essential factors for determining liability under the *Keen* rule. The appellate court in the *Jones* case, in denying the plaintiff his damages, con-

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[14] *Jones v. Lykes Bros. Steamship Co., Inc.*, 108 F. Supp. 323, 324 (D.C.S.D.N.Y., 1952) being Finding of Fact No. 6 of the District Judge, quoted as such by the appellate court, *Jones v. Lykes Bros. Steamship Co.*, 204 F. 2d 815, 816 (C. C. A. 2d, 1953).

cluded that the trial court's finding of no provocation for the assault had been made with an improper regard for the conditions of a shipboard community. The court further observed that while *Jones'* actions toward his assailant might have been insufficient provocation to a shoreside worker for a personal encounter, a shoreside worker's attitude was not the measure of the disposition of the ordinary man who follows the *sea*. The plain meaning of this appellate view is that the assault was provoked by shipboard standards. Therefore, the *appellate* opinion in *Jones* also accords with petitioner's emphasis on provocation in determining liability under the *Keen* rule.

(2)

At page 13 of its brief respondent states:

> "In *Keen*, the injured party *provoked* the assault and *recovered damages*." (Emphasis added)

This statement is erroneous in two respects:

(a) *Keen* did not recover damages, as far as we know; the lower court had entered judgment on a verdict for the *defendant* and the Court of Appeals reversed and remanded the case for a new trial.

(b) The *issue* of provocation was not decided. Assuming the alleged finding of the appellate court (that " . . . Keen knocked down Mruczinski with his fist") to be part of the *rationale* of the *Keen* decision it does not follow that the subsequent murderous blow with a meat cleaver was thereby provoked. While a fist might provoke a defensive or even a retaliatory *fist* it may not be sufficient to provoke a

calculated attempt to kill with a deadly weapon, perpetrated in an atmosphere of ambush. From the foregoing it logically follows that provocation is a matter of degree and is a conclusion of fact to be drawn with proper regard for the attending circumstances in any given case.

(3.)

At page 14 of its brief respondent states:

> "Seaworthiness" of personnel, . . . can only be determined by prior conduct, and "unseaworthiness" can only be deduced from prior misconduct."

This statement erroneously proceeds upon the premise that one act of depraved violence on the part of a seaman is not an indication of his personality and temperament. While it may be taken as true for present purposes that sailors lead a rough life, so it may be with stevedores, professional athletes, pugilists, and others. In these groups, as with seamen, a sense of "natural fairness" is not lacking. If this rule of natural fairness is breached this fact can readily be determined *after* the breach has occurred. No prior performance is necessary to arrive at the conclusion that the offender acted in an unaccepted manner.

The warranty of seaworthiness to a seaman has never been conditioned upon the shipowner's knowledge of prior defects in hull, gear and appliances. If this Honorable Court concludes that the warranty extends to the dispositional competence of the crew, prior misconduct should not be a sacramental element of liability. Prior performance may well serve as an indication of the seaman's alleged defective disposition, but it is not the *sine qua non*.

Perhaps respondent's mistaken emphasis on prior misconduct is a by-product of its acquaintance with the general tort concept that "every dog is entitled to one bite" before his owner can be held responsible for the animal's antisocial behavior. This tort axiom is predicated upon a theory not present in the warranty of seaworthiness, namely, that a tortfeasor is legally responsible for *negligence* only where its consequences are reasonably foreseeable. In the dog-bite situation the law reasons that if the dog has never bitten before, its owner, whose liability is predicated upon foreseeability, cannot foretell that the animal is vicious until after the "first bite." Under the General Maritime Law, however, the shipowner is legally responsible on the very first occasion that the defect evidences itself.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and those set forth in petitioner's original brief on the merits of this cause, the findings and conclusions of the District Court regarding liability should be reinstated, and that this cause should be remanded to the Court of Appeals for the Fifth Circuit for further proceedings on the question of *quantum*.

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